

HON. JOHN C. COUGHENOUR

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WOLFIRE GAMES, LLC, *et al.*, individually and on behalf of all others similarly situated,

Plaintiffs,

V.

VALVE CORPORATION,

Defendant.

Case No. 2:21-cv-00563-JCC

**PLAINTIFFS' SURREPLY IN
OPPOSITION TO DEFENDANT'S
MOTION TO COMPEL ARBITRATION**

**NOTED ON MOTION CALENDAR:
October 8, 2021**

16 In response to Plaintiffs' challenges to the validity of the arbitration provision in the SSA,
17 Valve argues that the SSA delegates such questions to an arbitrator. But controlling law requires
18 "clear and unmistakable" delegation; otherwise, the issue is for the Court. *First Options of Chicago,*
19 *Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The SSA contains no such delegation. Valve argues that
20 incorporating the AAA rules implicitly delegates all unconscionability challenges to an arbitrator.
21 Dkt. 56, Reply 2-4. But, unlike Valve's cases (*id.*), the SSA has no explicit delegation clause, and
22 incorporates the AAA rules only "**as modified by this Agreement.**" Dkt. 36-5, SSA § 11.C
23 (emphasis added). The SSA's modifications to the AAA rules render delegation of validity
24 challenges to the representative arbitration waiver far from "clear and unmistakable."

Plaintiffs explained that the SSA’s attempt to prohibit representative claims like Plaintiffs’ antitrust and Washington CPA claims by requiring “Individual Binding Arbitration Only” renders the arbitration provision unconscionable and thus unenforceable. Dkt. 51, Opp. 15-16. The SSA unequivocally states that “[a] court has exclusive authority to rule” on that very issue. SSA § 11.D

1 (emphasis added). Thus, rather than clearly and unmistakably delegating Plaintiffs' specific validity
 2 challenges to the arbitrator, this provision instead reserves them for this Court. *See Blair v. Rent-A-*
 3 *Ctr., Inc.*, 2017 WL 4805577, at *1 (N.D. Cal. Oct. 25, 2017).

4 Likewise, Section 12 of the SSA contemplates that *courts* may find the SSA "illegal or
 5 unenforceable." *See* SSA § 12 ("in the event that any provision of this Agreement shall be held by
 6 [a] ... court ... to be illegal or unenforceable ..."). Moreover, Section 12 specifically invokes
 7 Section 11.E if a "court" (among other tribunals) finds any portion of Section 11 "illegal or
 8 unenforceable." This poison pill applies if "a finding of partial illegality or unenforceability would
 9 allow ... representative arbitration." Opp. 15-16. These provisions independently confirm that the
 10 SSA does not clearly and unmistakably delegate validity challenges. *See Cobarruviaz v. Maplebear,*
 11 *Inc.*, 143 F. Supp. 3d 930, 940 (N.D. Cal. 2015) (no delegation where agreement said "'any arbitrator
 12 or court'" could declare agreement invalid); *Money Mailer, LLC v. Brewer*, 2016 WL 11479219, at
 13 *3 (W.D. Wash. Nov. 15, 2016) (similar); *Vargas v. Delivery Outsourcing, LLC*, 2016 WL 946112,
 14 at *6-*8 (N.D. Cal. Mar. 14, 2016) (similar).

15 Finally, Valve is wrong that the Ninth Circuit held in *G.G. v. Valve* that the SSA delegates
 16 *validity* challenges. Reply 1-4. Rather, *this Court* resolved such challenges. 2017 WL 1210220, *2-
 17 3 (W.D. Wash. April 3, 2017); *see also* 799 F. App'x 557, 558 (9th Cir. 2020). What the Ninth
 18 Circuit instead noted had been delegated were "questions of *arbitrability*"; that is, whether a dispute
 19 fell within the scope of the arbitration agreement. 799 Fed. App'x. at 558. But Plaintiffs do not raise
 20 such arbitrability issues here.

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2021, I caused a true and correct copy of the foregoing to be filed in this Court's CM/ECF system, which sent notification of such filing to counsel of record.

DATED October 8, 2021

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